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M Yusuf v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO P-05(M)-18–01 OF 2018
UMI KALTHUM, HARMINDAR SINGH AND RHODZARIAH BUJANG JJCA
15 JULY 2019

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Criminal Procedure — Trafficking in dangerous drugs — Custody and control — Whether mere fact drugs were found concealed behind wall in engine room of ship ipso facto meant master/owner of ship had custody and control of the drugs — Whether custody and control could not be presumed but had to be proven in normal way — Whether even if master/owner of ship had knowledge of drugs on ship it did not mean he had custody and control of the drugs — Whether knowledge alone without proof of custody or control could not amount to mens rea possession — Whether rebuttable presumption in s 37(f) of Dangerous Drugs Act 1952 that if dangerous drugs were found concealed in ship they were concealed with knowledge of the master of the ship could only be applied if master was physically on board vessel when the drugs were discovered — Whether such must have been intention of Parliament since s 37(f) excluded owner of ship from the presumption

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The appellant ('Yusuf'), an Indonesian national, was the owner and master of a boat which had four crew members on board when it was raided by Malaysian marine customs officers. Yusuf was not on board the vessel at the time but he was summoned to attend at the marine customs base where the boat was taken for inspection. Initially, a search by the officers did not reveal anything incriminating. But when sniffer dogs from the narcotics unit were deployed, the officers discovered an assortment of dangerous drugs together with a package containing a pistol, a bullet magazine and 31 bullets concealed behind a wall at the back of the engine room. The wall had to be demolished to access the items. The drugs found were 5,805.1g of methamphetamine, 4,807.2g of 3, 4-methylenedioxymethamphetamine, 0.37g of ketamine, 0.05g of nimetazepam and 994.1g of pseudoephedrine. Yusuf and the four crew members were jointly charged with trafficking in methamphetamine and methylenedioxymethamphetamine under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA'), for possession of the ketamine and nimetazepam under s 12(2) of the DDA and for possession of the pseudoephedrine under s 9(1) of the Poisons Act 1952. At the end of the prosecution's case, the trial judge acquitted and discharged the four crew members after finding that custody and control of the drugs had not been proven against them. The judge found that only Yusuf, by virtue of being the master and owner of the boat, had custody and control of the drugs. The trial judge then invoked against Yusuf the

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presumption in s 37(f) of the DDA that he had knowledge of the drugs and that the acts of 'concealing' and 'transporting' of the drugs amounted to trafficking under s 2 of the DDA. In making his defence to the charge, Yusuf said that while he was on Penang island, he met the boat's former owner, Ali, who asked Yusuf if he could transport 12 boxes of 'jamu' (herbal medication) on his boat to Acheh, Indonesia, for a total payment of 60m Rupiah which Ali would pay when he collected the goods at Acheh. Yusuf said he agreed and told Ali to load the cargo onto the boat when his crew member was there. Yusuf said he was not present when the boxes were loaded onto the boat but he received a call from Ali 'an hour later' to say the loading had been completed. Yusuf further said that he did not save Ali's cellphone number and could not remember it either. The trial judge rejected Yusuf's defence and found that: (a) Ali was 'a recent invention' and 'an afterthought' because his existence was never brought up during the prosecution's case; (b) Yusuf did not provide sufficient particulars about Ali to allow the police to investigate his existence; (c) the alleged 60m Rupiah that Yusuf was promised for the transportation of the 'jamu' was too exorbitant to be believable; (d) Yusuf was wilfully blind to what the boxes contained and could not claim to be an innocent carrier; (e) the defence was a mere denial; and (f) Yusuf failed to rebut the statutory presumptions of knowledge and trafficking and also failed to raise a reasonable doubt in the prosecution's case. Yusuf was found guilty on all the charges, sentenced to death for the trafficking offences and given varying jail terms for the remaining offences. The sole ground in the instant appeal against the entire decision was that the trial judge erred in deciding that the prosecution had established a prima facie case simply on the ground that Yusuf had custody and control of the drugs because he was the master and owner of the boat and by application of the s 37(f) presumption, he had mens rea possession of the drugs. Section 37(f) stated that if any dangerous drugs were found concealed in any ship or aircraft, it shall be presumed, until the contrary was proven, that the drugs were concealed with the knowledge of the master of the ship or aircraft.

Held, by majority, setting aside the convictions and sentences and acquitting and discharging appellant:

(1) (**per Harmindar Singh JCA, majority**) Knowledge alone without custody and control could not amount to possession. The presumption of knowledge arose from custody or control. To assert that since one had knowledge it must be presumed that there was custody and control was a fallacious argument. Custody and control must be proved as a fact in the normal way. In the instant case, even if the presumption under s 37(f) of the DDA applied, it would, at its highest, only prove knowledge but not possession. The prosecution had therefore failed to prove a prima facie case against Yusuf on all the charges (see paras 26–27).

(2) (**per Harmindar Singh JCA, majority**) To establish a charge of trafficking, possession had to be proven first. To establish possession,

custody and control had to be proven in the normal way. Custody and control could not be presumed. Once custody and control was established, the presumptions of possession and knowledge would apply. In the instant case, Yusuf was never on the boat when the drugs were found. He could not be said to have been in custody and control of the boat, let alone the drugs, at the relevant time. It was actually the second accused who was in charge of the engine room of the boat when it was seized (see paras 14 & 20).

(3) (**per Harmindar Singh JCA, majority**) Since Yusuf was not on the boat when it was raided, the presumption of knowledge under s 37(f) did not apply to him. The presumption under s 37(f) only applied to the master of the ship and not to its owner. In comparison, if drugs were found concealed in a vehicle, the presumption of knowledge under s 37(h) would apply to both the owner and the person in charge of the vehicle and in the case of drugs found concealed in any premises, the presumption of knowledge in s 37(g) would fasten onto the occupier of the premises. Considering the way in which the presumptions of knowledge were set out under s 37 of the DDA and on whom they could apply, Parliament must have intended to fasten knowledge on the master of the ship or aircraft only if the master of the ship or aircraft was on board when the dangerous drugs were discovered. Otherwise, the owner of the ship or aircraft would not have been excluded from the application of the presumption. In any event, the factual matrix of the case supported the inference that Yusuf could not have had knowledge because if he had known that there were drugs concealed on the boat, he would not have willingly come to the boat as he knew the boat had been seized by customs (see paras 22–24).

(4) (**per Harmindar Singh JCA, majority**) Ali's existence was disclosed in Yusuf's statement that was recorded four days after Yusuf's arrest. Hence, the trial court's finding that the story concerning Ali was a recent invention and an afterthought was tenuous. Yusuf's defence was also not a mere denial because he had given a version of events which, if believed, was consistent with his innocence (see paras 8–10).

(5) (**per Rhodzariah Bujang JCA, dissenting**) The fact that Yusuf was not physically present when the customs officers raided the boat did not negate the fact that he was still the man who was overall in charge and therefore had control and custody of the vessel. What was most damning in this case was the fact that the drugs were not found in some accessible place on the boat, where possession could be latched onto anyone else who had access to the boat; rather, they were concealed behind a wall of the engine room which had to be demolished in order to retrieve the drugs. Had it not been for the sniffer dogs, the drugs would not have been discovered. Thus, custody and control of the drugs had been proven by

A the prosecution and with the aid of the presumption under s 37(f) the element of possession was established as well. Even without the said presumption, the way in which the drugs were concealed gave the only inference that it must have been done with Yusuf's knowledge for he was not just the master of the boat but also its owner. In his capacity as both
B master and owner, he was in possession of the boat and hence the drugs, even though he was not physically present when the raid was first conducted. Yusuf failed to rebut the presumption of knowledge or to raise a reasonable doubt in the prosecution's case (see paras 42).

C (6) (**per Rhodzariah Bujang JCA, dissenting**) Not only was there justification to say that Ali was just a fictitious character cooked up by Yusuf, it was totally improbable that Ali would have been able to dismantle the wall of the engine room, hide the drugs there and then reconstruct the wall all within one hour, for that was the period Yusuf said
D elapsed after Ali left with the boxes from Yusuf's rented room and then called him from the boat to say that the deed was done. It was equally improbable for Yusuf not to have saved Ali's contact number in his cellphone because he was supposed to have been paid upon delivery of the 'jamu' in Acheh (see para 45).

E (7) (**per Rhodzariah Bujang JCA, dissenting**) The defence was rightly rejected by the trial judge. The accusations levelled against the investigating officer for failing to investigate Ali did not hold water because the scanty detail of just a first name and physical description was
F insufficient (see para 45).

(8) (**per Rhodzariah Bujang JCA, dissenting**) The huge quantity of drugs in the instant case and the manner in which it was concealed in the boat satisfied the finding of trafficking under s 2 of the DDA. The argument that Yusuf's going to the boat voluntarily upon being informed about the
G raid and in not running away showed his absence of knowledge about the drugs was not tenable because Yusuf was asked to come to the boat before the drugs were found. The way in which the drugs were concealed would also give anyone similarly circumstanced as Yusuf a certain amount of confidence that the drugs would not be easily discovered. In fact, without
H the assistance of the sniffer dogs, the drugs would not have been discovered (see paras 41 & 43).

[Bahasa Malaysia summary

I Perayu ('Yusof'), seorang warganegara Indonesia, merupakan pemilik dan tuan satu kapal yang mempunyai empat orang krew di atasnya apabila mereka telah diserbu oleh pegawai kastam marin Malaysia. Yusof tidak berada di atas kapal tersebut tetapi dia telah dipanggil untuk hadir di pangkalan kastam marin yang mana kapal tersebut telah dibawa untuk pemeriksaan. Pada mulanya, pemeriksaan yang dilakukan oleh pegawai tersebut tidak menunjukan apa-apa

kesalahan. Namun apabila anjing pengesan daripada unit narkotik digunakan, pegawai tersebut menemui pelbagai jenis dadah berserta dengan satu bungkusan mengandungisatu pistol, magazin peluru, dan 31 peluru yang disorok dibelakang satu dinding di bahagian belakang bilik enjin. Dinding tersebut terpaksa dirobohkan untuk mengakses barang tersebut. Dadah yang ditemui adalah 5,805.1g methamphetamine, 4,807.2g jenis 3, 4-methylenedioxymethamphetamine, 0.37g ketamine, 0.05g nimetezapam dan 994.1g pseudoephedrine. Yusuf dan empat orang krew dituduh bersama dengan mengedar dibawah s 12(2) ADB dan milikan methylenedioxymethamphetamine dibawah s 39B(1)(a) Akta Dadah Berbahaya ('ADB'), untuk milikan ketamine dan nimetezapam dibawah s 12(2) ADB dan untuk milikan psedoephedrine dibawah s 9(1) Akta Racun 1952. Di akhir kes pendakwaan, hakim bicara melepaskan dan membebaskan empat orang ahli krew selepas mendapati bawah penjagaan dan kawalan dadah tersebut tidak dibuktikan terhadap mereka. Hakim hanya mendapati bahawa hanya Yusof, selaku pemilik dan tuan kapal tersebut, mempunyai kawalan dan penjagaan dadah tersebut. Hakim bicara kemudiannya menggunakan terhadap Yusof, anggapan diawah s 37(f) ADB yang dia mempunyai pengetahuan dadah dan pelakuan menyorok dan mengangkut dadah terjumlah kepada pengedaran dibawah s 2 ADB. Dalam membela dirinya terhadap peruduhan, Yusof mengatakan bahawa apabila dia berada di Pulau Pianang, dia telah berjumpa dengan pemilik terdahulu boat tersebut, Ali yang bertanya sama ada dia boleh membawa 12 kotak jamu atas kapalnya ke Acheh, Indonesia, untuk bayaran sebanyak RM60 juta Rupiah yang mana Ali akan membayarnya apabila dia mengambil barang tersebut di Acheh. Yusof mengatakan bahawa dia bersetuju dan memberitahu Ali untuk meletakkan kargo tersebut diatas kapalnya dan ahli krewnya berada di sana. Yusuf mengatakan dia tidak berada di sana semasa kotak tersebut diletakkan keatas kapal tetapi dia mendapat panggilan telefon daripada Ali satu jam kemudian yang mengatakan bahawa tindakan muat naik telah diselesaikan. Yusuf kemudiannya mengatakan bahawa dia tidak menyimpan nombor telefon Ali dan juga tidak mengingatinya. Hakim bicara kemudiannya menolak pembelaan Yusuf dan mendapati bahawa: (a) Ali merupakan rekaan dan satu yang difikirkan semula kerana kewujudannya tida pernah ditimbulkan sewaktu kes pendakwaan; (b) Yusuf tidak mengemukakan butiran yang mencukupi untuk membolehkan pihak polis menyiasat kewujudannya; (c) 60 juta Rupiah yang Yusuf dikatakan dijanjikan untuk membawa jamu adalah terlalu tinggi untuk dipercayai; (d) Yusuf telah membutakan dirinya secara sengaja terhadap isi kandungan kotak tersebut dan tidak boleh mengatakan bahawa dia merupakan seorang pembawa tidak bersalah; (e) pembelaan merupakan satu pembelaan kosong; and (f) Yusuf gagal untuk mematahkan anggapan statutori pengetahuan dan pengedaran dan juga gagal untuk menimbulkan keraguan munasabah dalam kes pendakwaan. Yusuf didapati bersalah atas kesemua pertuduhan dan dijatuhkan hukuman mati untuk kesalahan pengedaran dan tempoh pemenjaraan berbeza untuk kesalahan yang

A lain. Alasan tunggal dalam rayuan ini terhadap keseluruhan keputusan adalah bahawa hakim bicara terkhilaf dalam memutuskan bahawa pihak pendakwaan telah membuktikan satu kes prima facie atas alasan bahawa Yusuf mempunyai kawalan dan penjagaan terhadap dadah tersebut kerana dia merupakan pemilik dan tuan kapal dan dengan pemakaian anggapan s 37(f), dia mempunyai
B milikan mens rea dadah tersebut. Seksyen 37(f) mengatakan bahawa sekiranya apa-apa dadah berbahaya yang ditemui disorok atas apa-apa kapal atau kapal terbang, ianya adalah dianggap, kecualimana di buktikan sebaliknya, bahawa dadah tersebut disorok dengan pengetahuan tuan kapal atau kapal terbang
C tersebut.

Diputuskan, dengan majoriti, mengetepikan sabitan dan hukuman dan melepaskan dan membebaskan perayu:

(1) (**oleh Harmindar Singh HMR, majoriti**) Pengetahuan sahaja tanpa
D kawalan dan penjagaan tidak merupkan milikan. Tanggapan pengetahuan timbul daripada kawalan dan milikan. Untuk mengatakan bahawa memandangkan seorang mempunyai pengetahuan, ianya dianggap bahawa wujud kawalan dan penjagaan adalah satu hujahan yang salah. Kawalan dan penjagaan perlu dibuktikan sebagai fakta dalam
E cara yang biasa. Dalam kes ini, jikalaupun tanggapan dibawah s 37(f) diguna pakai, ianya akan, pada peringkat tertinggi pun, membuktikan pengetahuan dan bukan milikan. Pihak pendakwa telah gagal untuk membuktikan satu kes prima facie terhadap Yusof atas semua pertuduhan (lihat perenggan 26–27).

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(2) (**oleh Harmindar Singh HMR, majoriti**) Untuk menubuhkan pertuduhan pengedaran, milikan haruslah dibuktikan terlebih dahulu. Untuk membuktikan milikan, kawalan dan penjagaan perlu dibuktikan dengan cara yang biasa. Kawalan dan penjagaan tidak boleh dianggap.
G Apabila kawalan dan penjagaan dibuktikan, anggapan milikan dan pengetahuan akan terpakai. Dalam kes ini, Yusof tidak pernah berada di atas kapal tersebut apabila dadah tersebut ditemui. Dia tidak boleh dikatakan mempunyai kawalan dan penjagaan kapal tersebut, pada masa yang relevan. Ianya adalah sebenarnya tertuduh yang kedua yang
H bertanggungjawab dalam bilik enjin kapal tersebut apabila ianya dirampas (lihat perenggan 14 & 20).

(3) (**oleh Harmindar Singh HMR, majoriti**) Memandangkan Yusuf tidak berada atas kapal tersebut apabila ianya diserbu, anggapan pengetahuan dibawah s 37(f) tidak terpakai terhadapnya. Anggapan dbawah s 37(f)
I ianya terpakai kepada tuan kapal dan bukan pemiliknya. Sebagai perbandingan, sekiranya dadah ditemui di sorok dalam satu kenderaan dan di dalam kes dadah ditemui disorok dalam apa-apa premis, anggapan pengetahuan dalam s 37(g) akan terpakai terhadap penghuni premis tersebut. Mengambil kira cara yang mana anggapan pengetahuan

dinyatakan dibawah s 37 DDA dan pada siapa mereka terpakai, Parlimen semestinya berniat untuk meletakkan pengetahuan pada tuan kapal atau kapal terbang hanya jika tuan kapal atau kapal terbang tersebut berada diatas kapal tersebut apabila dadah tersebut ditemui. Jikalau tidak, pemilik kapal atau kepal terbang tidak akan dikecualikan daripada pemakaian anggapan. Dalam apa perkara, fakta kes menyokong inferens bahawa Yusof tidak boleh mempunyai pengetahuan kerana sekiranya dia mengetahui bahawa dadah tersebut disorok atas kapal tersebut, dia tidak akan secara sukarela datang ke kapal tersebut kerana dia mengetahui bahawa kapal tersebut telah dirampas oleh pihak kastam (lihat perenggan 22–24).

(4) (**oleh Harmindar Singh HMR, majoriti**) Kewujudan Ali yang telah dinyatakan dalam pengataan Yusuf yang dirakam empat hari selepas tangkapan Yusof. Oleh itu, dapatan mahkamah bicara bahawa cerita mengenai Ali merupakan rekaan baharu dan satu yang difikirkan kemudian adalah satu yang boleh diabaikan. Pembelaan Yusuf juga bukan satu penafian semata-mata kerana dia telah memberikan satu versi kejadian, yang sekiranya dipercayai, adalah konsisten dengan ketakbersalahannya (lihat perenggan 8–10).

(5) (**oleh Rhodzariah Bujang HMR, menentang**) Fakta bahawa Yusuf tidak hadir secara fizikal apabila pegawai kastam menyerbu kapal tersebut tidak menafikan fakta bahawa dia masih merupakan individu yang bertanggungjawab dan oleh itu mempunyai kawalan dan penjagaan kapal tersebut. Apa yang mengeruhkan lagi keadaan dalam kes ini adalah fakta bahawa dadah tersebut tidak ditemui dalam satu kawasan yang boleh diakses atas kapal tersebut, yang mana milikan boleh diletakkan pada sesiapa yang mempunyai akses kepada kapal tersebut; sebaliknya, ianya disembunyikan dibelakang satu dinding di bilik enjin yang perlu dirobohkan untuk mendapatkan semula dadah tersebut. Jikalau tidak untuk anjing pengesan, dadah tersebut tidak akan ditemui. Oleh itu, kawalan dan penjagaan dadah tersebut telah dibuktikan oleh pendakwaan dan dengan bantuan anggapan dibawah s 37(f) elemen milikan juga telah dibuktikan. Walaupun tanpa anggapan tersebut, cara yang mana dadah tersebut disembunyikan membawa keapda inferens bahawa ianya mesti dilakukan dengan pengetahuan Yusuf kerana dia bukan sahaja tuan kapal tersebut tetapi juga pemiliknya. Dalam kapasitinya sebagai tuan dan pemilik, dia mempunyai milikan terhadap kapal tersebut dan juga dengan itu dadah tersebut, walaupun dia tidak hadir secara fizikal semasa serbuan pada mulanya dijalankan. Yusuf gagal untuk mematahkan anggapan pengetahuan atau untuk menimbulkan satu keraguan yang munasabah dalam kes pendakwaan (lihat perenggan 42).

(6) (**oleh Rhodzariah Bujang HMR, menentang**) Bukan sahaja wujud

justifikasi untuk mengatakan bahawa Ali merupakan satu individu yang direka oleh Yusuf, ianya juga tidak mempunyai kebarangkalian bahawa Ali boleh untuk merobohkan dinding bilik injin dengan sendirinya, menyorok dadah tersebut disitu dan kemudiannya membina semula dinding tersebut dalam masa satu jam, kerana adalah dalam tempoh masa tersebut yang Yusuf katakan telah berlalu selepas Ali pergi meninggalkan kotak dari bilik yang disewa oleh Yusuf dan kemudiannya menelefonnya dari kapalnya untuk mengatakan bahawa perkara tersebut telah dilakukan. Ianya juga tidak berkebarangkalian untuk Yusuf tidak menyimpan nombor telefon Ali dalam telefon bimbitnya kerana dia sepatutnya dibayar selepa jamu tersebut di hantar di Acheh (lihat perenggan 45).

(7) (**oleh Rhodzariah Bujang HMR, menentang**) Pembelaan telah secara betul ditolak oleh hakim bicara. Tuduhan yang dibuat terhadap pegawai penyiasat kerana gagal untuk menyiasat Ali tidak boleh ditampung kerana hanya butiran nama pertama dan deskripsi fizikal adalah tidak mencukupi (lihat perenggan 45).

(8) (**oleh Rhodzariah Bujang HMR, menentang**) Jumlah dadah yang besar dalam kes ini dan cara yang mana ianya disembunyikan dalam kapal tersebut memenuhi dapatan pengedaran dibawah s 2 ABD. Hujahan bahawa tindakan Yusuf untuk pergi ke kapal secara sukarela selepas dimaklumkan oleh serbuan dan tidak melarikan diri menunjukan ketiadaan pengetahuannya pada dadah tersebut tidak boleh diterima kerana Yusuf telah diminta untuk datang ke kapal tersebut sebelum dadah ditemui. Cara yang mana dadah tersebut disembunyikan juga akan menyebabkan sesiapa dalam keadaan tersebut sedemikian sejumlah keyakinan bahawa dadah tersebut tidak boleh ditemui dengan mudah. Walhal, tanpa bantuan anjing pengesan, dadah tersebut tidak boleh ditemui (lihat perenggan 41 & 43).]

Cases referred to

Chan Pean Leon v PP [1956] 1 MLJ 237 (refd)
DA Duncan v PP [1980] 2 MLJ 195, FC (refd)
Hoh Bon Tong v PP [2010] 5 CLJ 240, CA (refd)
Leow Nghee Lim v Reg [1956] 1 MLJ 28 (refd)
Magendran a/l Mohan v PP [2010] 6 MLJ 619; [2010] 5 CLJ 390, CA (refd)
Megat Halim bin Megat Omar v Pendakwa Raya [2008] MLJU 647; [2009] 1 CLJ 154, CA (refd)
Munuswamy Sundar Raj v PP [2015] 6 MLJ 214; [2016] 1 CLJ 357, FC (refd)
Ong Ah Chuan v PP [1981] 1 MLJ 64, PC (refd)
PP v Abdul Manaf bin Muhamad Hassan [2006] 3 MLJ 193, FC (refd)
PP v Herlina Purnama Sari [2016] 2 MLJ 724; [2017] 1 MLR 499, CA (refd)
Tan Kim Ho & Anor v PP [2009] 3 MLJ 151; [2009] 3 CLJ 236, FC (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 37(g), (h), (j), 39B(2), First Schedule
Poisons Act 1952

Appeal from: Criminal Trial No 45A-19–05 of 2016 (High Court, Kuala Lumpur)

Mohd Irwan bin Sumadi (Selvi Sandrasegaram) for the appellant.
Dhiya Syazwani Izyan bt Mohd Akhir (Deputy Public Prosecutor, Attorney General's Chamber) for the respondent.

Harmindar Singh JCA (delivering majority judgment of the court):

[1] The appellant, together with four other accused persons, jointly faced five charges at the High Court at Pulau Pinang for offences under the Dangerous Drugs Act 1952 ('the Act') and the Poisons Act 1952. The charges read as follows:

Pertuduhan Pertama

Bahawa kamu bersama — sama pada 8.9.2015, jam lebih kurang 10.00 malam, di Pangkalan Marin Kastam, Pengkalan Weld, di dalam Negeri Pulau Pinang telah didapati mengedar dadah berbahaya iaitu Methamphetamine seberat 5805.1 gram, dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama, yang dibaca bersama seksyen 34 Kanun Keseksaan.

Pertuduhan Kedua

Bahawa kamu bersama — sama pada 8.9.2015, jam lebih kurang 10.00 malam, di Pangkalan Marin Kastam, Pengkalan Weld, di dalam Negeri Pulau Pinang telah didapati mengedar dadah berbahaya iaitu 3,4 Methylenedioxymethamphetamine [MDMA] seberat 4807.2 gram, dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama, yang dibaca bersama seksyen 34 Kanun Keseksaan.

Pertuduhan Ketiga

Bahawa kamu bersama — sama pada 8.9.2015, jam lebih kurang 10.00 malam, di Pangkalan Marin Kastam, Pengkalan Weld, di dalam Negeri Pulau Pinang telah didapati memiliki dadah berbahaya iaitu Ketamine seberat 0.37 gram, dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 12(2) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 12(3) Akta yang sama, yang dibaca bersama seksyen 34 Kanun Keseksaan.

Pertuduhan Keempat

Bahawa kamu bersama — sama pada 8.9.2015, jam lebih kurang 10.00 malam, di Pangkalan Marin Kastam, Pengkalan Weld, di dalam Negeri Pulau Pinang telah didapati memiliki dadah berbahaya iaitu Nimetazepam seberat 1.5 gram, dengan

itu kamu telah melakukan suatu kesalahan di bawah seksyen 12(2) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 12(3) Akta yang sama, yang dibaca bersama seksyen 34 Kanun Keseksaan.

Pertuduhan Kelima

Bahawa kamu bersama — sama pada 8.9.2015, jam lebih kurang 10.00 malam, di Pangkalan Marin Kastam, Pengkalan Weld, di dalam Negeri Pulau Pinang telah memiliki racun iaitu Pseudoephedrine seberat 994.1 gram, dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 9(1) Akta Racun 1952 yang boleh dihukum di bawah seksyen 32(2) Akta yang sama, yang dibaca bersama seksyen 34 Kanun Keseksaan.

[2] After a trial, the four other persons were acquitted and discharged without their defence being called. The appellant was, however, found guilty of all the charges. He was accordingly convicted and sentenced to death on the charges under s 39B(2) of the Act and to sentences of imprisonment on the rest of the charges by the High Court on 29 December 2017. The appellant then filed this appeal.

[3] The appeal was heard on 17 April 2019. At the conclusion of the submissions, we allowed the appeal by majority with our learned sister Rhodzariah J dissenting. We set aside the convictions and sentences passed by the High Court and substituted in its place an order for acquittal and discharge. Our reasons for doing so now follow. This will form the majority judgment of the Court.

THE CASE FOR THE PROSECUTION

[4] The prosecution called eight witnesses. The facts leading to the arrest of the appellant were set out in the judgment of the learned judicial commissioner ('judge') as follows (at pp 15–18, appeal record, Vol 1):

[3] Pada 8.9.2015, SP3 yang bertugas sebagai Penguasa Kastam di Unit Marin, Bahagian Penguatkuasaan, Jabatan Kastam DiRaja Malaysia (JKDM), Pulau Pinang telah mengetuai satu operasi yang melibatkan sepasukan anggota serbuan yang terdiri dari 7 orang Pegawai Kastam untuk memeriksa sebuah Bot.

[4] Pada tarikh yang sama, jam lebih kurang 5.00 petang, SP3 dan pasukan yang menaiki Bot Penumpas 051 dari Pangkalan Marin Kastam di Weld Quay menuju ke Dermaga Perai telah merapati Bot KM Pangeran (eksibit P107). Menurut SP3, yang berada di atas Bot KM Pangeran tersebut pada ketika itu adalah OKT2, OKT3, OKT4 dan OKT5. Setelah memperkenalkan diri kepada OKT2 hingga OKT5, SP3 telah bertanyakan siapa tekong Bot (ketua kapal) tersebut dan diberitahu nama OKT1. SP3 juga diberitahu bahawa OKT1 tiada di atas kapal dan SP3 meminta OKT3 untuk menghubungi OKT1 melalui telefon bimbitnya. SP3 kemudian telah bercakap dengan OKT1 melalui telefon bimbit tersebut dan memintanya untuk hadir di Pangkalan Marin Kastam di Weld Quay untuk membuat pemeriksaan lanjut ke atas Bot (eksibit P107) tersebut.

[5] Seterusnya OKT2 hingga OKT5 serta 2 orang anggota serbuan telah diminta oleh SP3 untuk berada di atas Bot (eksibit P107) tersebut dan dibawa ke Pangkalan Marin Kastam di Weld Quay sambil diiringi oleh SP3 dan anggota serbuan lain di atas Bot Penumpas 051. Setibanya di Pangkalan Marin Kastam di Weld Quay, Bot (eksibit P107) ditambat dan ketika itu OKT1 tiba pada jam lebih kurang 6.30 petang hari yang sama.

[6] SP3 kemudian mengarahkan pemeriksaan menyeluruh dibuat ke atas Bot (eksibit P107), bermula di bahagian atas Bot dahulu sambil disaksikan oleh kelima-lima OKT di atas jeti bersama SP3. Pemeriksaan di atas Bot mengambil masa dalam 30 minit, namun tiada barang salah dijumpai.

[7] Kemudiannya, lebih kurang jam 8.30 malam, di atas permintaan bantuan oleh SP3, 2 Pegawai Kastam dari Unit Narkotik JKDM Pulau Pinang telah tiba di Pangkalan Marin Kastam, Weld Quay tersebut dengan membawa anjing pengesan dadah (APD). Dua orang pegawai tersebut adalah SP6 dan Pegawai Kastam C.S. Surenthiran a/l Chandrasegaran (Pegawai Kastam Suren). SP3 telah meminta SP6 dan seorang lagi bersama dengan APD tersebut untuk menjalankan pemeriksaan di bahagian atas kapal dahulu. Hasil pemeriksaan di bahagian atas kapal tersebut dimaklumkan oleh SP6 dan PEGAWAI KASTAM Suren bahawa anjing pengesan dadah (APD) tidak memberi apa-apa respon.

[8] Seterusnya, SP3 meminta SP6 dan Pegawai Kastam Suren untuk meneruskan pemeriksaan bersama APD di bahagian badan Bot, iaitu di bahagian meletak kargo dan di bahagian ruangan enjin. Setelah selesai menjalankan pemeriksaan di kedua-dua bahagian tersebut, SP6 dan Pegawai Kastam Suren memaklumkan bahawa anjing pengesan dadah (APD) telah memberi respon ke atas satu bahagian dinding papan yg terletak di satu sudut di bahagian belakang ruang bilik enjin.

[9] Seterusnya, pada jam lebih kurang 10.00 malam tarikh 8/9/2015, SP5 telah memanggil SP3 untuk turun ke ruangan enjin kapal tersebut disebabkan kerja-kerja memecah telah selesai dilakukan dan memaklumkan penemuan barang yang mencurigakan. SP3 menyatakan melihat satu ruang kecil yang terdiri daripada 4 petak kecil yang mengandungi bungkusan-bungkusan plastik. SP3 kemudiannya telah melihat hablur kristal di dalam salah satu bungkusan tersebut. SP3 telah mengeluarkan sebanyak 19 bungkusan plastik.

[10] Semasa tugas-tugas pembongkaran dibuat, kelima-lima OKT duduk di hadapan SP3 menyaksikan kerja-kerja pembongkaran tersebut. SP3 menyatakan hasil pembongkaran tersebut telah menemui 10 bungkusan yang disyaki dadah jenis syabu, 8 bungkusan yang disyaki mengandungi dadah jenis ecstacy dan satu bungkusan mengandungi 1 pistol, 1 kelopak peluru dan 31 butir peluru.

[11] Kesemua rampasan yang mengandungi bahan kristal serta pil/tablet disyaki dadah tersebut telah dihantar oleh SP8 ke Jabatan Kimia Malaysia, Ipoh, Perak Darul Ridzuan untuk dianalisa dan telah disahkan oleh ahli kimia (SP4) di Mahkamah melalui Laporan Kimia (eksibit P38) sebagai mengandungi :

(a) Methamphetamine seberat 5,805.1 gram,

(b) 3, 4-Methylenedioxymethamphetamine (MDMA) seberat 4,807.2 gram,

(c) etamine seberat 0.37 gram,

(d) Nimetazepam seberat 0.05 gram; dan

(e) Pseudoephedrine seberat 994.1 gram

[12] Methamphetamine, 3, 4 — Methylenedioxymethamphetamine (MDMA), Ketamine dan Nimetazepam adalah disenaraikan dalam Jadual Pertama Akta Dadah Berbahaya 1952, manakala Pseudoephedrine adalah ditetapkan dalam Jadual Pertama Akta Racun 1952.

[5] At the end of the prosecution's case, the learned trial judge found that the other four accused persons did not have custody or control of the impugned drugs and poison and therefore the prosecution had failed to make out a prima facie case against them. They were all acquitted and discharged.

[6] In the appellant's case, the learned judge found that the appellant had custody and control of the illicit drugs and the poison as he was the master and owner of the said boat. The learned judge relied on the presumption in s 37(f) of the Act to come to a finding that the appellant had knowledge of the concealed drugs. For the element of trafficking, the learned judge relied on s 2 of the Act and found that the acts of 'concealing' and 'transporting' a large quantity of drugs had established trafficking. The appellant was then ordered to enter his defence on all the charges.

THE DEFENCE CASE

[7] The appellant chose to give evidence on oath. His evidence was summarised by the learned trial judge as follows (at pp 50–52, appeal record, Vol 1):

[68] OKT telah membeli Bot KM Pangeran dari seorang lelaki Acheh bernama Ali melalui seorang kawan di Acheh, Indonesia. OKT menyatakan telah bertemu semula dengan Ali di Pulau Pinang sewaktu Ali menyatakan ingin menyimpan barang dalam Bot OKT.

[69] OKT adalah kapten kapal, manakala Mawardi, Sofyan Ali, Alamsyah Piah dan Abdullah. Mhd adalah anak-anak Bot KM Pangeran. Ini adalah kali ketiga OKT masuk ke Pulau Pinang untuk membeli barangan terpakai.

[70] Setelah sampai di Pulau Pinang, OKT telah naik ke darat dan minum di sebuah kedai Acheh yang dikenali sebagai 'Kak Beti' berdekatan Hotel Assakin di Weld Quay. OKT telah kemudiannya masuk ke bilik rumah sewa di belakang kedai Acheh.

[71] Lebih kurang 3 hari selepas OKT sampai, Ali telah menghubungi OKT melalui telefon memaklumkan akan datang berjumpa OKT untuk kirim barang iaitu jamu. OKT menyatakan Ali telah datang berjumpa OKT di biliknya dan memberitahu mahu menumpang jamu di Bot KM Pangeran untuk dibawa balik ke Acheh.

[72] OKT beri kebenaran kepada Ali untuk naiki kapal dan memaklumkan Alamsyah Piah berada di kapal. OKT menyatakan Ali tunjukkan kepadanya

kotak-kotak yang dibawanya dalam sebuah beg hitam. OKT telah melihat dan pegang kotak-kotak yang dibawa Ali yang hendak disimpannya di Bot. OKT tidak dapat melihat apa isi kandungan kotak-kotak tersebut. OKT tidak menyangka dan tidak tahu ia mengandungi dadah-dadah, racun, senjata api dan peluru.

[73] OKT mempercayai apa yang diberitahu Ali kepadanya bahawa ia berisi jamu. OKT tidak ikut dan menyaksikan Ali menyimpan barang di atas Bot KM Pangeran. Sejam kemudian, OKT menyatakan Ali menelefonnya dan memberitahu sudah menyimpan barang di kapal dan mahu pulang ke Kuala Lumpur kemudian terus ke Acheh.

[74] OKT menyatakan Ali memberitahunya bahawa Ali akan mengambil jamu tersebut di Kuala Langgar, Acheh Timur dengan bayaran sebanyak 5 juta Rupiah sekotak dan kesemuanya ada 12 kotak. OKT menyatakan keesokan harinya Ali ada menelefon dari Indonesia dan memberitahu OKT sekali lagi bahawa akan mengambil jamunya di Indonesia.

[75] OKT menyatakan telah dihubungi oleh Sofyan Ali dan dimaklumkan Kastam memeriksa Bot dan mahu bawa balik kapal ke Jeti Kastam di Pengkalan Weld. OKT telah pergi ke Jeti Kastam di Weld Quay dan menunggu Bot KM Pangeran tiba. Setelah tiba, Bot telah diperiksa tetapi tidak jumpa apa-apa barang salah.

[76] Pada jam 10 malam, Kastam membawa anjing untuk memeriksa Bot dan menjumpai barang salah di bilik enjin kapal. OKT menyatakan barang salah yang dijumpai adalah seperti dalam kes ini dan juga pistol dan peluru. Sewaktu kesemua barang salah dijumpai, ia dibalut dan OKT tidak dapat melihat isi kandungan kesemua bungkusan. Sepanjang masa, OKT menyatakan dia menyangka ianya jamu yang Ali maksudkan. Kesemua barang salah yang dijumpai di atas Bot KM Pangeran adalah kepunyaan Ali dan bukan kepunyaan OKT dan anak-anak kapal OKT. Ia telah diletakkan oleh Ali sendiri di atas kapal. OKT tiada di kapal sewaktu Ali meletakkannya.

[77] OKT menyatakan sepanjang masa Ali telah menghubunginya, adalah melalui telefon bimbit OKT jenama Nokia yang kecil. OKT tidak boleh ingat nombor telefon yang Ali gunakan dan OKT tidak menyimpan atau save nombor telefon Ali atas nama 'Ali'. Namun begitu nombor telefon Ali masih ada dalam rekod panggilan telefon atau call records telefon OKT sewaktu OKT ditahan.

[8] At the conclusion of the trial, the learned judge appreciated that the appellant's testimony with regard to the drugs in question was at variance with the version given by the prosecution witnesses. The learned judge, however, did not accept the version of the appellant and found that the existence of the person Ali was never disclosed during the case for the prosecution and was therefore a recent invention and an afterthought.

[9] Now, with respect, this finding is rather tenuous as the existence of Ali was in fact disclosed in the statement of the appellant marked as exh D118 which was recorded four days after the appellant's arrest. So, the story of Ali being the person responsible for transporting the goods which later turned out to be illicit drugs was not a recent invention. The learned judge, however, also

took issue with the fact that the appellant did not provide sufficient particulars of what had transpired and sufficient particulars of Ali as well.

[10] Curiously as well, the learned judge considered the version given by the appellant to be a mere denial by relying on the dicta in *DA Duncan v Public Prosecutor* [1980] 2 MLJ 195 and *Magendran a/l Mohan v Public Prosecutor* [2010] 6 MLJ 619; [2010] 5 CLJ 390. With respect, we did not think the appellant's version was a mere denial because the appellant had given a version of events which, if believed, would be consistent with his innocence. In the end, the learned judge found that the appellant had failed to rebut the statutory presumption under s 37(f) of the Act as well as failed to raise a reasonable doubt on the case for the prosecution. The appellant was accordingly found guilty, convicted and sentenced to death.

THE INSTANT APPEAL

[11] Before us, although several grounds were listed in the petition of appeal, learned counsel for the appellant attacked the findings of the learned trial judge on one pivotal issue only. The contention was the learned judge had made a fatal error in deciding that a prima facie case had been established at the end of the prosecution's case.

[12] The criticism that was fashioned before us was that the learned judge had fallen into grave error in finding that the appellant had custody and control of the impugned drugs simply because he was the master and the owner of the boat in which the said drugs were found. It was also asserted that the learned judge was in error in applying the presumption of knowledge under s 37(f) of the Act. The argument was that the element of custody and control must first be established before the element of knowledge can be applied to prove mens rea possession.

[13] Now, it can sometimes be the case that illicit drugs are discovered by the authorities in a premises, or in a vehicle or as in this case, in a ship or aircraft. In each of these cases, there are presumptions set out in s 37(f) of the Act in which knowledge is presumed. We will come back to these presumptions later.

[14] However, in order to establish a charge of trafficking, it is trite law that the prosecution must prove that an accused person had possession of the illicit drugs unless, of course, there is evidence of the buying or selling of dangerous drugs. To establish possession, the prosecution must prove that the accused had custody or control of the dangerous drugs. Custody may be sole or joint with others. There is no presumption of custody or control. It must be proved in the normal way. Once custody or control is established, the presumptions of possession and knowledge of the dangerous drugs will apply.

[15] In the present appeal, the impugned drugs were found in a boat known as KM Pangeran. The relevant presumption which may assist the prosecution is found in s 37(f) of the Act which states:

> 37(f) if any dangerous drugs is found to be concealed in any ship or aircraft it shall be presumed, until the contrary is proved, that the said drug was concealed with the knowledge of the master of the ship or aircraft.

[16] The definition of 'ship' is expressed in very broad terms under s 2 of the Act in which 'ship' includes every description of ship, boat or craft used in navigation, whether propelled by oars or otherwise, or used for the carriage or storage of goods.

[17] Now, the learned judge was conscious to the fact that the element of custody and control and therefore possession must be established. He had quite rightly referred to the established cases of *Chan Pean Leon v Public Prosecutor* [1956] 1 MLJ 237 and *Leow Nghee Lim v Reg* [1956] 1 MLJ 28 for guidance on the meaning of 'possession' in relation to offences under the Act.

[18] However, although the appellant was never in the boat when the drugs were found and only came later when SP3 had called him on his mobile phone and asked him to be present at the *Pengkalan Marin Kastam,* the learned judge went on to hold that the appellant had custody and control of the drugs that were found. This is how the learned judge put it (at p 41, appeal record, Vol 1):

> [49] Dalam kes ini, OKT1 yang merupakan kapten dan juga pemilik Bot KM pangeran (keterangan ini juga tidak dinafikan dan dicabar) tersebut juga dijumpai kad pelautnya (eksibit P15) bersama dengan kad pelaut OKT2 hingga OKT5 serta dokumen lain yang menunjukkan bahawa kapal tersebut adalah milik OKT1 (eksibit P13G (1-8), juga turut ditemui di dalam kapal tersebut oleh SP3. Bersandarkan kepada fakta ini, jelas membuktikan bahawa OKT1 mempunyai kawalan dan penjagaan ke atas Bot tersebut termasuk semua barangan yang berada di atas Bot tersebut.

[19] This finding by the learned judge suggests that that since the appellant had custody and control of the boat, he must also have had custody of all the items in the boat including the incriminating drugs. The learned judge then applied the presumption under s 37(f) of the Act to fasten knowledge of the drugs on the appellant.

[20] With respect, we must state at the outset that this finding is untenable. The appellant was never in the boat when the boat was seized by the customs officers. He only arrived much later after he was called. He could not be said to be in custody or control of the boat let alone the impugned drugs at the relevant time. It was actually the second accused who was in charge of the engine room of the boat when it was seized. Even the prosecution witness, customs officer

SP3, conceded that the appellant was not in custody and control of the dangerous drugs as he was not in the boat when the raid was conducted.

[21] Now, the learned deputy public prosecutor ('DPP') came up with a rather startling and bizarre response to support the finding of the learned judge. The learned DPP contended that since the appellant was present when the search was conducted in the boat and when the drugs were found, he was therefore in custody or control of the drugs. If we were to accept this argument, it would open the door to the authorities to trick or force the master of the ship or aircraft to be on board when the ship or aircraft is searched so as to then trigger the presumption under s 37(f) of the Act. Suffice it to say, this argument was totally devoid of any merit.

[22] Coming back to the application of the presumption under s 37(f) of the Act, we were doubtful as to whether the factual matrix in this case supported the invocation of that presumption. We noted that the presumption only applied to the master of the ship and not its owner. We noted that in the case of drugs concealed in a vehicle, the presumption of knowledge under s 37(h) of the Act applied also to the owner apart from the person in charge of the vehicle. In the case of drugs found concealed in any premises, the presumption of knowledge under s 37(g) of the Act was fastened on the occupier of the premises.

[23] Considering the way in which the presumptions are set out and on whom they can apply, it must have been the intention of the Legislature to fasten knowledge on the master of the ship or aircraft only in the case where the master of the ship or aircraft was on board when dangerous drugs are discovered. Otherwise, the owner of the ship or aircraft would not have been excluded from the application of the presumption. Since the appellant was not in the boat when the raid on the boat was conducted, the presumption of knowledge under s 37(f) of the Act does not apply to the appellant.

[24] In any event, the factual matrix of the case supported the inference that the appellant could not have had knowledge. If indeed he had known that there were drugs concealed on the boat, he would not have willingly come to the boat as he knew the boat had been seized by the customs.

[25] Be that as it may, there was some confusion as to whether knowledge of the drugs equates to possession. In this context, it is trite that knowledge alone does not establish possession. A person may have all the knowledge but he cannot be said to be in possession if he has no custody or control. To take an obvious example, a person may see someone hiding dangerous drugs in a

premises. Even though he may have knowledge and may even know the nature of the drugs, he cannot be said to be in possession as he has no custody or control over them.

[26] So, as one cannot have possession without knowledge, knowledge alone without custody and control cannot amount to possession. As alluded to earlier, there is no presumption of custody or control. The presumption arises from custody or control. So, to assert that since one has knowledge it must be presumed that there is custody and control is a fallacious argument. Custody and control must be proved as a fact in the normal way. In the instant case, even if the presumption under s 37(f) of the Act applied to the appellant, it would at its highest only prove knowledge but not possession (see *Leow Nghee v Lim v Reg*).

CONCLUSION

[27] Given the circumstances as we have alluded to, and for the reasons we have given, we were of the view that the prosecution had failed to establish a prima facie case against the appellant on all the charges. There were certainly merits in the appeal and appellate intervention was warranted. Accordingly, by majority, we allowed the appeal and set aside the conviction and sentence passed by the High Court. The appellant was acquitted and discharged.

Rhodzariah Bujang JCA (delivering dissenting judgment of the court):

[28] The appellant in this appeal is an Indonesian national and the skipper of a boat, KM Pangeran, which was registered in Indonesia. As a result of a raid conducted by the Enforcement Unit of Royal Malaysian Customs Department (Customs Department) headed by a Superintendent of Customs, Zamrose Abdul Malik (PW3), various assortment of drugs were found in the boat and the appellant and four of his crew members were arrested and charged in the High Court of Penang with five charges which read as follows:

> 1st Charge:
>
> Bahawa kamu bersama – sama pada 8.9.2015, jam lebih kurang 10.00 malam, di Pangkalan Marin Kastam, Pengkalan Weld, di dalam Negeri Pulau Pinang telah didapati mengedar dadah berbahaya iaitu Methamphetamine seberat 5805.1 gram, dengan itu kamu telah melakukan suatu kesalahan di bawah Seksyen 39B[1][a] Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah Seksyen 39B[2] Akta yang sama, yang dibaca bersama seksyen 34 Kanun Keseksaan.
>
> 2nd Charge:
>
> Bahawa kamu bersama – sama pada 8.9.2015, jam lebih kurang 10.00 malam, di Pangkalan Marin Kastam, Pengkalan Weld, di dalam Negeri Pulau Pinang telah didapati mengedar dadah berbahaya iaitu 3,4 Methylenedioxymethamphetamine

[MDMA] seberat 4807.2 gram, dengan itu kamu telah melakukan suatu kesalahan di bawah Seksyen 39B[1][a] Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah Seksyen 39B[2] Akta yang sama, yang dibaca bersama seksyen 34 Kanun Keseksaan.

3rd Charge:

Bahawa kamu bersama – sama pada 8.9.2015, jam lebih kurang 10.00 malam, di Pangkalan Marin Kastam, Pengkalan Weld, di dalam Negeri Pulau Pinang telah didapati memiliki dadah berbahaya iaitu Ketamine seberat 0.37 gram, dengan itu kamu telah melakukan suatu kesalahan di bawah Seksyen 12[2] Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah Seksyen 12[3] Akta yang sama, yang dibaca bersama seksyen 34 Kanun Keseksaan.

4th Charge:

'Bahawa kamu bersama – sama pada 8.9.2015, jam lebih kurang 10.00 malam, di Pangkalan Marin Kastam, Pengkalan Weld, di dalam Negeri Pulau Pinang telah didapati memiliki dadah berbahaya iaitu Nimetazepam seberat 0.05 gram, dengan itu kamu telah melakukan suatu kesalahan di bawah Seksyen 12[2] Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah Seksyen 12[3] Akta yang sama, yang dibaca bersama seksyen 34 Kanun Keseksaan.

5th Charge:

Bahawa kamu bersama – sama pada 8.9.2015, jam lebih kurang 10.00 malam, di Pangkalan Marin Kastam, Pengkalan Weld, di dalam Negeri Pulau Pinang telah memiliki racun iaitu Pseudoephedrine seberat 994.1 gram, dengan itu kamu telah melakukan suatu kesalahan di bawah Seksyen 9[1] Akta Racun 1952 yang boleh dihukum di bawah Seksyen 32[2] Akta yang sama, yang dibaca bersama seksyen 34 Kanun Keseksaan.

[29] At the close of the prosecution's case, the learned judicial commissioner found no prima facie case has been made out by the prosecution against the crew members and they were discharged and acquitted of all five charges. There was no appeal filed by the prosecution against the said decision. As for the appellant, he gave sworn evidence and was the sole witness for the defence. He was convicted and sentenced to death for the first and second charges, six months imprisonment for the third charge, four months imprisonment for the fourth charge and one month imprisonment for the fifth charge. All the imprisonment sentences were ordered to take effect on the date of arrest and to run concurrently.

[30] His appeal before us is in respect of the said decision. We heard the appeal on the 24 January 2019 and 17 April 2019 and by a majority decision, his appeal was allowed and he was discharged and acquitted of all charges. I dissented and my reasons for doing so are as follows.

SALIENT FACTS FOR THE PROSECUTION

[31] It is not in dispute that when the custom officers first came on board the boat, the appellant was not in it, only his crew members were. He was called by the third accused who requested that he come to the Pangkalan Marin Kastam at Weld Quay where the boat was subsequently berthed and he did. He was present when the initial examination of the boat by the officers at 6.30pm revealed nothing incriminating and in the subsequent one when the said drugs were discovered with the assistance of sniffer dogs from the Narcotic Unit of the Customs Department. These drugs were concealed in the wall at the back of the engine room and were only discovered after the said wall was demolished. Together with the drugs, a package containing one pistol, one bullet magazine and 31 bullets were also found in the same place. It was not in dispute that the drugs discovered, after the analysis by the chemist ('PW4'), were of the type and weight as stated in the five charges and that these are drugs listed in the First Schedule of the Dangerous Drugs Act 1952 ('the DDA'). Therefore, the first ingredient in respect of the first to fourth charges have been satisfied. Likewise, the first ingredient for the fifth charge as the drug is listed under the Poisons Act 1952.

[32] It is the second ingredient of the charge that is the element of possession of the drugs which was the bone of contention before the learned judicial commissioner and in the appeal before us. Before delving into that issue in respect of the appellant, just for completeness, I would just mention that at para 43 of His Lordship's grounds of judgment, he found that the second to fifth accused has no custody and control of the boat as well as the drugs that were concealed behind the wall of the engine room.

[33] In respect of the appellant, this was the learned judicial commissioner's contrary finding at pp 49–52 of the said grounds of judgment:

> [49] Dalam kes ini, OKT1 yang merupakan kapten dan juga pemilik Bot KM pangeran (keterangan ini juga tidak dinafikan dan dicabar) tersebut juga dijumpai kad pelautnya (eksh P15) bersama dengan kad pelaut OKT2 hingga OKT5 serta dokumen lain yang menunjukkan bahawa kapal tersebut adalah milik OKT1 (eksh P13G (1–8), juga turut ditemui di dalam kapal tersebut oleh SP3. Bersandarkan kepada fakta ini, jelas membuktikan bahawa OKT1 mempunyai kawalan dan penjagaan ke atas Bot tersebut termasuk semua barangan yang berada di atas bot tersebut.
>
> [50] Dalam kes *Teh Hock Leong lwn Public Prosecutor* [2008] MLJU 284; [2008] 4 CLJ 764, di ms 769 Mahkamah Rayuan memutuskan bahawa:
>
> > ... we agree with the learned trial judge that the method employed to bring the drugs in question from Thailand into Malaysia was done in a most cunning fashion to escape detection by the authorities. The method employed to convey or transport a drug may sometimes furnish evidence of knowledge. For example,

A an attempt to carefully conceal a drug may indicate an intention to avoid detection and thereby point to knowledge. Of course it all depends on the facts of each individual case.

[52] Berdasarkan kepada matriks fakta kes ini, saya bergantung kepada anggapan di bawah s 37(f) Akta Dadah Berbahaya 1952 (Akta 234) yang berbunyi seperti berikut:

B

37 In all proceedings under this Act or any regulation made thereunder —

(a) ...

C (f) If any dangerous drug is found to be concealed in any ship or aircraft it shall be presumed, until the contrary is proved, that the said drug is so concealed with the knowledge of the master of the ship or aircraft and has been imported in such ship or aircraft;

D **[34]** On the final element of trafficking, the learned judicial commissioner relied on the definition of trafficking under s 2 of the Dangerous Drugs Act 1952 and the decision in *Ong Ah Chuan v Public Prosecutor* [1981] 1 MLJ 64 and *Public Prosecutor v Abdul Manaf bin Muhamad Hassan* [2006] 3 MLJ 193 where conveyance of large quantity of drugs from one place to another raises E the inference that it was not for the accused's personal consumption but for trafficking and that the accused must satisfy the court on a balance of probabilities that it was for his own consumption before he can be acquitted of the charge of trafficking.

F THE DEFENCE

[35] In essence the defence of the appellant was to put the blame on one fellow Indonesian from Acheh named Ali who he claimed was the previous owner of the boat and who sold the boat to him for 100m rupiah. This sale said G the appellant was witnessed by a friend, Md Noor, but the receipt for the payment was lost. He said three days after their arrival in Penang, Ali contacted him and requested him to bring back 'jamu' (herbal medication) and that he would collect the 'jamu' from him in Acheh. Ali promised to pay him 5m Rupiah for each box of the 'jamu' upon delivery. He was shown by Ali 12 boxes H of this 'jamu' but not their content. However, the appellant said he did not accompany Ali to the boat to send the 'jamu' and an hour later Ali called him to say that he had done so and would be proceeding to Acheh. The appellant said the drugs seized from the boat belonged to Ali.

I **[36]** The learned judicial commissioner rejected this defence as being one of an afterthought as it was not supported by his caution statement ('exh D118') and Ali was never brought up by the defence during the prosecution's case. His Lordship cited at length the Federal Court's decision in *Tan Kim Ho & Anor v Public Prosecutor* [2009] 3 MLJ 151; [2009] 3 CLJ 236 as well as this court's

decision in *Megat Halim bin Megat Omar v Pendakwa Raya* [2008] MLJU 647; [2009] 1 CLJ 154 on the failure to cross-examine prosecution's witnesses in support of an accused's defence. That excerpt from *Tan Kim Ho*'s case is reproduced below:

> [33] In our adversarial system of justice, the duty of each party is to show that his case is the truth. This is done by him adducing his own witnesses to support his contention. When it is the plaintiff or prosecutor who is adducing the evidence, his witnesses are subject to cross-examination by the defence or the accused person. When a prosecution witness makes a statement of fact which is disagreed to by the defence it becomes the defence's duty to, in whatever way, put to the plaintiff or prosecution witness that what the witness has said is not true. In addition, he could also use the plaintiff's or prosecution's witnesses to adduce evidence to support his defence and to indicate what his defence is. This he is required to do to enable the plaintiff or prosecution to bring out evidence to disprove what the defence intends to adduce. If the defence does not in any way indicate by cross-examination of those facts, those statements made by the plaintiff's or prosecution's witnesses must be accepted as true. Even if the plaintiff's or prosecution's witness does not say anything relating to the defence case, it is still the duty of the defence to bring out his case during plaintiff's or prosecution's case. In fact this duty to disclose his defence during the prosecution's case is more relevant in criminal cases than in civil. This is particularly so when the plaintiff or prosecution's witness is relevant to the fact in issue. In criminal cases, the prosecution does not know what the defence is going to be, except in alibi, until the defence adduces its evidence.
>
> [34] The failure of a party to put questions to his opponent's material witnesses in cross-examination is said by Gopal Sri Ram JCA in *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770; [1995] 3 CLJ 639 to be an abandonment of the pleaded case and may be barred from raising it in argument thereafter.

[37] His Lordship went on to consider the caution statement of the appellant ('exh D118') where the appellant did mention Ali and the 'jamu' that he was asked to bring back to Acheh but that he did not know Ali's full name as he just knew him and could not remember Ali's telephone number which he did not save. In the said statement he also said he did not bring the 'jamu' himself to the boat because some people say that it should not be done. The learned judicial commissioner noted the appellant had failed to give Ali's personal details to enable the investigating officer to investigate and only gave description of Ali's personal appearance in his witness statement. His reason for not bringing the boxes to the boat himself was merely to hide the fact that he know that the boxes contained drugs. As for the huge amount paid for him to deliver the 'jamu' ie totaling 60m Rupiah, the learned judicial commissioner noted that it was even more than half the cost of the boat and totally illogical for Ali to do so. The appellant should have ensured that the boxes indeed contained 'jamu' said His Lordship and he was therefore willfully blind and therefore not an innocent carrier. Guided by the case authorities in respect of this defence such as *Hoh Bon Tong v Public Prosecutor* [2010] 5 CLJ 240, *Munuswamy Sundar Raj v*

Public Prosecutor [2015] 6 MLJ 214; [2016] 1 CLJ 357 and *Public Prosecutor v Herlina Purnama Sari* [2016] 2 MLJ 724; [2017] 1 MLR 499, His Lordship concluded that the appellant had knowledge of the impugned drugs.

[38] Based on the appellant's own admission in his witness statement where he answered to a question posed to him, vis:

> S15 Adakah kamu tahu tanggungjawab sebagai tekong atau kapten kapal?.
>
> J15: Sebagai Tekong Kapal, saya bertanggungjawab ke atas kapal dan barang yang saya bawa dan saya adalah orang yang ada kuasa penuh ke atas kapal dan kargo yang ada atas kapal.

The learned judicial commissioner found the appellant has custody and control of all that was on board the boat which were out in the open or concealed. He therefore concluded that the defence was a mere denial and a fabrication and the appellant has failed to rebut the presumption of knowledge under the said s 37(j) of the DDA on a balance of probabilities as well as failed to raise any reasonable doubt on the prosecution's case. Section 37(j) had been quoted in the learned judicial commissioner's judgment which I had reproduced earlier.

THE APPEAL

[39] The appellant's learned counsel in his submission before us raised only one issue and that is that the prosecution has failed to establish a prima facie case against the appellant as it has failed to prove that the appellant had custody and control of the impugned drugs. He highlighted the fact that it was the second accused who was the person responsible for the engine room and as agreed by PW3 in his cross-examination at pp 92–93 of the appeal record Vol 2A, the appellant has no custody and control over the drugs when the witness said as follows:

> S: Sewaktu serbuan dilakukan, OKT boleh ambil barang salah ubah ke tempat lain?
>
> J: Tidak boleh.
>
> S: Kenapa tidak boleh?
>
> J: Kerana OKT1 tidak berada di dalam bot ketika itu.

[40] Learned counsel also stressed the fact that the boat and engine room were accessible to the crew and others. Reference was made to the evidence of PW3 at pp 97–98 as well as p 102 of Vol 2A of the appeal record in support of the said contention:

> S: Di tempat di mana bot-bot ini berlabuh, tiada apa-apa halangan untuk sesiapa menaiki masuk ke dalam bot dan keluar dari bot, setuju?
>
> J: Tidak tahu.

S: Di tempat di mana bot-bot ini berlabuh, melalui jalan laut, tiada apa-apa halangan betul? **A**

J: Betul.

...

S: Sewaktu isi barang siapa keluar masuk naik bot kamu tidak tahu? **B**

J: Ya, tidak tahu.

S: Rujuk P33 gambar bot, ini gambar bot sewaktu tangkapan?

J: Ya.

S: Kalau dirujuk gambar bot, tidak ada apa-apa halangan seperti kunci, mangga dari luar masuk terus ke bilik enjin, betul? **C**

J: Betul.

S: Bila tiada apa-apa halangan, sesiapa ada akses bot itu boleh terus ke tempat barang salah ditemui, betul? **D**

J: Betul.

(Rekod Rayuan Jilid 2A, M/S 102)

S: Kamu tidak tahu siapa yang naik kapal, siapa yang turun kapal sebelum serbuan?

J: Betul. **E**

[41] On knowledge, learned counsel submitted that the appellant's conduct in voluntarily going to the boat upon being informed about the raid by the third accused shows absence of knowledge for if he had such knowledge he would have run away. With respect, I am unable to agree with that submission **F** because that call was made to the appellant after the raiding party boarded the boat but before the discovery of the drugs and it must be remembered that the drugs were not kept in some open space but concealed behind a wall in the engine room. Surely such concealment would raise a certain amount of confidence in a person similarly circumstanced that it would not be easily **G** discovered. In fact without the assistance of the sniffer dogs, the drugs would not have been discovered.

[42] In her reply to the issue raised, the learned DPP submitted, inter alia, **H** that defence of Ali being the original owner of the boat was never raised in the caution statement recorded from the appellant in this case but in that recorded by the police in respect of the firearm (exh D123). This is a correct statement and it is also noted that the caution statement given to the police was recorded earlier ie 18 September 2015 whereas that to the customs officer was on 9 December 2015 ie almost three months later. It may be that the appellant **I** omitted to mention that fact because he had already mentioned it in earlier caution statement even though in both caution statements he did say the exact same facts about Ali giving him the 'jamu' and the other related events. The benefit of the doubt here must be given to the appellant. However, even with

benefit of that doubt, it does not impinge on the prosecution's success in proving a prima facie case against him because I am of the like mind as that of the learned judicial commissioner that he had custody and control of the drug by virtue of being the skipper or master of the boat. There is a perfectly good and sound reason why the presumption under s 37(j) was enacted and that is because common sense and sheer logic dictates that a person who is the captain of an aircraft or a master of a boat by virtue of his position as such is the person in charge of the vessel and in full custody and control of it. The fact that the appellant was not physically present when the customs officers first raided the boat does not negate the fact that he was still the man who was overall in charge and therefore had control and custody of the vessel. What is most damming in this case is the fact that the drugs were not found in some accessible place in the boat where possession could be latched onto anyone else who had access to the boat but concealed behind a wall of the engine room which had to be demolished in order to retrieve the drugs. I stressed again the fact that had it not been for the sniffer dogs, the drugs would not have been discovered. Thus, custody and control of the drugs had been proven by the prosecution and with the aid of the said presumption under s 37(j) the element of possession had been established as well. I would even venture to say that even without the said presumption, in the given facts of this case from the way the drugs were concealed, the only inference to be drawn is that it must be done with the appellant's knowledge for it must be remembered that the appellant was not just the master of the boat but also its owner. It stands to reason that in his capacity as both master and owner of the boat, he was in possession of it and hence the drugs even though he was not physically present when the raid was first conducted. Unlike the owner of a house where drugs are found, he may not live in it or may rent it out but the master of a ship or the captain of an aircraft has to be in the aircraft though not all 24 hours in a day. Thus, it behoves upon the appellant in his defence to rebut the presumption of knowledge and to raise a reasonable doubt on the prosecution case.

[43] Learned counsel for the appellant also submitted that the learned judicial commissioner had wrongly found that the appellant was trafficking under s 2 of the DDA because he concealed and transported drugs of such huge quantity. Learned counsel sought to distinguish *Public Prosecutor v Abdul Manaf bin Muhamad Hassan* [2006] 3 MLJ 193 on the ground that the drugs were found on Abdul Manaf's body ie tucked at the waist and in the pocket of his track top and trousers.

[44] Although it is stated in the cited case that the mere act of transporting drugs from one point to another does not make an accused a trafficker but the Federal Court did say that whether he is one must be considered in the circumstances of the case including the quantity of the drug. It has also been decided that the larger the quantity the more probable it is that the drugs were

not personal consumption but meant for trafficking. The manner of concealment has also been said to be a relevant consideration. Now given the huge quantity of the drugs in this case as well as the manner in which it was concealed coupled with the fact that it was carried in the boat, these facts would satisfy the usage of s 2 of the DDA as was done by the learned judicial commissioner and I am therefore of the view that the learned judicial commissioner has not erred in finding a prima facie case against the appellant.

[45] As for the defence, it is clear from the evidence that the defence has failed to rebut the presumption of knowledge and raised a reasonable doubt on the prosecution case as held by the learned judicial commissioner. Not only was there justification to say that Ali was just a fictitious character cooked up by the appellant, it is also totally improbable that Ali would be able to dismantle the wall of the engine room, hid the drugs there and then reconstruct the wall all within one hour for that was the period the appellant said when Ali left with the boxes from the appellant's rented room and then called him from the boat to say that the deed was done. It is equally improbable for him not to save Ali's contact number in his handphone when he was supposed to be paid upon delivery of the 'jamu' in Acheh. The accusation levelled against the investigating officer by his learned counsel that he failed to investigate Ali does not hold water because with that scanty details of just a first name and physical description, how was the investigating officer supposed to investigate? The defence was therefore rightly rejected by the learned judicial commissioner and on these considerations, I have decided to dismiss the appeal and affirmed the conviction and sentence passed by the learned judicial commissioner.

Appeal allowed, conviction and sentence set aside.

Reported by Ashok Kumar